APPEAL NO. 010490

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 14, 2001. The hearing officer resolved two of the three disputed issues by determining that the respondent (claimant), having sustained a compensable injury on _____, reached statutory maximum medical improvement (MMI) on August 23, 2000, and had disability from January 28, 1999, to August 23, 2000. With respect to the remaining issue, the claimant's impairment rating (IR), the hearing officer requested the second designated doctor reexamine the claimant and properly assign an IR, as the record shows that at the first examination, this designated doctor determined that the claimant had not reached MMI. The appellant (carrier) appeals and argues that the original report of the first designated doctor should be given presumptive weight. It is the carrier's position that the second appointed designated doctor's report is simply an impermissible amendment to that of the first designated doctor. Further, the carrier argues that the hearing officer erred in making "gratuitous" findings of fact and conclusions of law regarding the parties' attendance at prior scheduled hearings. The claimant does not respond.

DECISION

Affirmed.

The carrier contends that the hearing officer should only consider the report of the first designated doctor, Dr. B, who found that the claimant reached MMI on January 27, 1999, with an IR of 9%, because the report of the second designated doctor, Dr. S, was an improper amendment to Dr. B's report. Dr. B examined the claimant on January 27, 1999. The carrier also argued that the length of time between Dr. B's report and Dr. S's report, about one year, was unreasonable; therefore, the carrier argued that the hearing officer should give presumptive weight to the report of Dr. B.

The hearing officer determined that upon reviewing Dr. B's report, the Texas Workers' Compensation Commission (Commission) sent a letter to him requesting clarification with respect to one of the claimant's medical conditions. Dr. B did not respond and the Commission was informed that he had moved to California. The hearing officer found that subsequent to discovering Dr. B's move from Texas and his failure to respond, the Commission appointed Dr. S as the designated doctor. The evidence reflects that Dr. S examined the claimant and on February 3, 2000, certified that the claimant had not reached MMI. As Dr. S's report is independent of Dr. B's, the hearing officer could conclude that Dr. S did not merely build upon or amend the report of Dr. B, but that he gave the claimant a complete examination and formed an original opinion based upon his own examination.

The hearing officer did not err in determining that the claimant reached MMI on August 23, 2000. The parties agreed and the hearing officer found that the date of the claimant's statutory MMI was August 23, 2000. When Dr. S examined the claimant in

February 2000, he determined that the claimant had yet to reach MMI. That report was the last on the record from Dr. S. Because a designated doctor cannot assign a prospective date as to a claimant's MMI, the hearing officer was correct in establishing that the claimant reached statutory MMI on August 23, 2000, the date of statutory MMI agreed upon by the parties. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(b)(4)(C)(i) (Rule 130.1(b)(4)(C)(i)) and Section 408.123(c) of the 1989 Act.

In addition, the hearing officer did not err in determining that the claimant had disability from January 28, 1999, to August 23, 2000. The claimant testified that he had been unable to obtain and retain employment at his preinjury wage from the time of the accident to the present because of his physical condition and the side effects of his medication. The hearing officer could conclude that the medical records support the claimant's testimony concerning disability in that the records chronicle not only the claimant's medical problems, but also his unemployment, purportedly due to his injury.

With respect to the issue regarding the claimant's IR, the hearing officer made no dispositive finding and ordered that Dr. S reexamine the claimant as soon as is practicable, since the claimant has now reached statutory MMI, and "make a proper certification in conformity with the proper edition and printing of the Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association]." Because a claimant may not be assigned an IR until he has reached MMI, the hearing officer had a legal basis for his order for reexamination. Section 408.123(a). Even though other doctors reached differing determinations regarding the claimant's MMI date and IR, pursuant to Section 408.125(e), the report of Dr. S, the designated doctor, is to be given presumptive weight with respect to MMI. Because Dr. S concluded at the time of his examination that the claimant had yet to reach MMI, he could not then assign an IR.

In addition, the carrier challenges on appeal the propriety of the hearing officer's findings of fact and conclusions of law with respect to the parties' respective failures to appear at previous hearings. The carrier cites no authority in support of its argument, and it is unfounded. The reasons for the parties' failures to appear at previous settings were discussed at length, on the record, at one of the previous hearings, held January 9, 2001. At that hearing, the hearing officer heard both parties describe their reasons for their failures to appear.

Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). This tribunal will not upset the challenged factual findings of a hearing officer unless they are so against

the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not find them so here.

For these reasons, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge